THE pebble PARTNERSHIP

April 29, 2014

EXECUTIVE SUMMARY OF THE PEBBLE LIMITED PARTNERSHIP'S RESPONSE TO EPA'S FEBRUARY 28, 2014 LETTER INITIATING THE CLEAN WATER ACT SECTION 404(C) PROCESS FOR THE PEBBLE MINE PROJECT

In disregard of the rule of law, established precedent, and long respected public policy, the U.S. Environmental Protection Agency ("EPA" or "Agency") has contrived to preemptively block the filing of permit applications for developing the largest and most valuable undeveloped supply of copper and gold in North America, a resource that could be critically important to the U.S. economy and employment in Alaska. Rather than allowing the filing of a mining permit application, EPA employees secretly plotted with environmental activists to undermine the ability of land owners to objectively evaluate and develop the proposed mining of the Pebble deposit in Southwest Alaska ("Pebble Project"), thereby establishing a precedent that will have long-term harmful impacts on investment and job creation in the United States.

This activity involved the misuse of U.S. government funds to create a flawed, junk science laden report, called the Bristol Bay Assessment, designed to negatively influence government, financial markets, and public policy. EPA launched its formal legal attack on February 28, 2014,[1] after years of stacking the deck against the Pebble Project; the attached document is the Pebble Limited Partnership's ("PLP's") response to EPA's latest effort to prejudice the project.

For the reasons set out in PLP's attached response, EPA should immediately rescind its letter stating that the Agency will proceed under Section 404(c) of the Clean Water Act ("CWA") to determine whether it will issue a veto for, or place conditions on, the Pebble Project prior to the submission of a CWA permit application to the U.S. Army Corps of Engineers ("Corps"). The Agency should wait until a permit application has been submitted and the Corps completes its permit application review as prescribed by U.S. environmental law and long-standing precedent.

EPA is reaching far beyond its statutory authority to begin the Section 404(c) veto process based solely upon speculation about the size of the project or the aquatic resources that may be impacted. The relevant statutes make clear that the Agency must wait until a permit application is submitted and the Corps review thereof is completed.

EPA has invited the PLP to provide information "to demonstrate that no unacceptable adverse effects to aquatic resources would result from discharges associated with mining the Pebble deposit . . . ."[2] However, it is fundamentally unfair and improper for EPA to place this

[1] Letter from Dennis J. McLerran, Regional Administrator, Region 10, EPA to Thomas Collier, Joe Balash and Col. Christopher D. Lestochi (Feb. 28, 2014) ("Feb. 28, 2014 EPA Letter").
[2] *Id.* at 2.

burden on PLP before a mine proposal has been fully designed, engineered and proposed to the Corps, particularly since EPA did not quantify any harm to the fisheries in its *Assessment of Potential Impacts on Salmon Ecosystems of Bristol Bay, Alaska* ("Assessment").[3] A comprehensive, science-based analysis of potential effects to aquatic resources can only be achieved during the rigorous, exhaustive CWA permit review and associated National Environmental Policy Act ("NEPA") review process to be undertaken by the Corps, in conjunction with the State of Alaska.

Section 404(c) Does Not Authorize EPA to Veto the Pebble Project Preemptively

Congress has intentionally restricted EPA's authority to veto permits for specified disposal sites based on a permit application under Section 404(c) of the CWA. The Supreme Court has similarly interpreted the CWA to give EPA authority to veto a Corps permit only "for a particular disposal site."[4] In defiance of congressional intent and the Supreme Court's interpretation, EPA is now asserting that the Agency can broadly veto any development within a large region before a Section 404 permit application has even been filed. The Agency's own internal documents weigh the pros and cons of taking "proactive" action under Section 404(c) prior to submission of the Pebble Project application. EPA is attempting to usurp the Corps' permit review authority and to relegate the Corps to a secondary role as a "consulting" agency.

Internal EPA documents also demonstrate EPA's intention to go beyond its statutory authority and to use a preemptive Section 404(c) veto as a mechanism for proactive zoning of watersheds.[5] EPA noted that there would be a "[l]itigation risk," that a preemptive veto had "[n]ever been done before in the history of the CWA," and that the preemptive veto "would result in "[i]mmediate political backlash."[6] Yet Section 404(c) does not authorize EPA to make broad land use or watershed decisions. EPA's authority under Section 404(c) is narrowly prescribed: EPA may veto a specific disposal site only if it can demonstrate unacceptable adverse effects to aquatic resources based on a specific permit. Indeed, EPA's preemptive initiation of the Section 404(c) process prior to the submission of a Section 404 permitting application is unprecedented. The economic harm to Alaskan citizens, companies and the expenditure of taxpayer money to fund this detour from the proper regulatory process can never be fully recovered.

It is always unlawful for an agency to revise legislative and judicial mandates. Such action is particularly inexcusable here, where the motivations for those revisions is simply to circumvent inconvenient impediments to the transient goals of a particular administration.

EPA Must Wait for the Corps' CWA and NEPA Review of a Permit Application

EPA's pre-emptive veto tactic is designed to freeze out the Corps, a co-responsible U.S. executive agency, charged by law with evaluating projects such as Pebble. EPA seems to fear that the Corps will come out the wrong way or look at the project too slowly or too competently.

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[3] EPA910-R-14-001A-C (Jan. 2014).
[4] *Coeur Alaska v. Se. Alaska Conservation Council*, 129 S.Ct. 2458, 2467 (2009).
[5] EPA, Bristol Bay 404(c) Discussion Matrix, HQ Briefing, at 1 (Sept. 8, 2010).
[6] *Id.*

Regardless of the reason, it cannot be countenanced. EPA should wait for the Corps' review of a permit application and associated NEPA review before deciding whether to initiate the Section 404(c) veto process for the Pebble Project. For decades, the Agency has waited for the Corps' review and NEPA review before initiating the Section 404(c) process and there is no credible excuse for not doing so here. The Corps' Section 404 review process, and the associated NEPA review, will provide a full record on the scope and potential impacts of the project, including project- and site-specific mitigation, with opportunities for EPA and public input.

Initiating the preemptive veto process would undermine the role and authority Congress assigned to the Corps under the CWA. The Corps must undertake a rigorous review of the permit application under CWA 404. Both the Corps' CWA permit review and the Environmental Impact Statement ("EIS") will provide robust data and analysis of the environmental impacts based on the details set forth in the application, as well as vital stakeholder and public input. The application itself will contain extensive information on the scope of the project, including detailed data on construction and operation plans, and potential impacts. Moreover, the Corps cannot issue a permit or license for an activity that may result in a discharge to waters of the United States until the state or tribe where the discharge would originate has granted or waived certification. Respect for the rights of the states and localities involved has been an historic hallmark of the permitting process, ignored here.

As EPA has admitted, the NEPA process would be more comprehensive and would address considerations beyond the scope of EPA's Assessment. An EIS would include a careful, thorough and systematic review of all of the impacts of the project, as proposed by the applicant, as well as reasonable alternatives and a full complement of project- and site-specific mitigation measures. The public, the Corps, EPA, tribes and the state would all be able to participate in developing the scope and content of the EIS. The state, tribes and local communities with a stake in the economics of the area could provide needed input concerning the economic and social impacts of the Pebble Project, including the salutary economic impact of expanded employment opportunities and augmentation of social services afforded by the presence of this project. The NEPA process could yield mitigation measures or alternatives that answer many of the concerns EPA has raised.

In the past, EPA only exercised its Section 404(c) authority rarely and as a last resort, after it reviewed a proposed Corps permit decision, provided any objections or comments through the NEPA process, and given the Corps and applicant an opportunity to address EPA's concerns through amended project design and/or project- and site-specific mitigation. In the 13 out of 14 times that EPA commenced the Section 404(c) process, a permit application had already been filed for a specific area for specific materials. In the sole application where a permit application had not been submitted for a specific site, EPA determined that the application to be filed would be substantially similar to two prior applications for neighboring sites.

EPA should continue its precedent in this case, as to act preemptively without a specific proposed project or full CWA and NEPA record would be legally unsupportable. These established procedures are the best means to achieve EPA's goal of assuring certainty to affected parties. Moreover, EPA scientists have admitted that the NEPA permitting process would be

more rigorous, comprehensive, and better suited to regulatory decision-making than the Assessment.[7] Abandoning the NEPA process – particularly when there could be no environmental harm in letting the process unfold – is counter-productive and inconsistent with EPA precedent.

EPA's Bristol Bay Assessment Does Not Provide a Legitimate Basis for Initiating Section 404(c) Action

EPA insists in its February 28, 2014 letter that its decision to proceed under Section 404(c) is based in large part on EPA's Assessment. But EPA's Assessment does not provide a legitimate basis for determining that the Pebble Project will cause an unacceptable adverse effect under Section 404(c) for several reasons:

- The Assessment evaluates mine scenarios of EPA's creation, which do not reflect modern mine engineering and environmental management practices. The Assessment's failure to consider modern mining and engineering practices led to numerous flaws in the Assessment, including:
    - Projected impacts on downstream water quality, water flows and aquatic habitat are greatly exaggerated.
    - Risks associated with tailings storage and other project features and operations are significantly overstated.
- PLP has not yet defined a proposed development plan for the Pebble Project; accordingly, development footprints and footprint impacts associated with the Assessment's mine scenarios are speculative. Speculation cannot form the basis for regulatory action under Section 404(c).
- The Assessment does not account for the robust compensatory mitigation measures (related to both aquatic habitat and wetlands) required of such a project.
- While the Assessment predicts certain impacts of mineral development on aquatic habitat, it provides no causal link between these effects and "unacceptable adverse effects" on any Bristol Bay fishery. For this reason, EPA has not demonstrated that mineral development will cause unacceptable adverse impacts on fishery areas in the Bristol Bay watershed.

Estimates of potential aquatic habitat impacts associated with stream flow changes resulting from EPA's three mine scenarios provide a good example of why the Assessment represents an insufficient scientific foundation for regulatory decision making. This is the case for a number of reasons:

[7] *See, e.g.*, Response to Peer Review Comments, at 82 ("The assessment is sufficiently comprehensive to meet its stated purpose. It is not intended to be an environmental impact assessment."); *id.* at 165 ("The assessment is not intended to duplicate or replace a regulatory process . . ."); *id.* at 217 ("[D]etailed evaluation of those effects will be left to the NEPA and permitting processes should a mine be proposed.").

- EPA has proposed an arbitrary surplus water release strategy for its three mine scenarios that would deny one of the streams surrounding the proposed Pebble Project (Upper Talarik Creek) from receiving any restorative flows to mitigate downstream habitat effects.

- EPA has wrongly and unfairly attributed its arbitrary surplus water release strategy to Northern Dynasty Minerals Ltd., owner of the Pebble Project. This attribution is entirely false.

- EPA has selected improper locations for releasing surplus water from its three mine scenarios, unnecessarily leaving miles of aquatic habitat in another stream surrounding the proposed Pebble Project (South Fork Koktuli) with no restorative flows.

- EPA has underestimated surplus water available for treatment and release by some 80%, leading to substantially larger flow-habitat effects than would actually occur.

- EPA has utilized an unsophisticated "rule of thumb" approach to measuring downstream habitat effects associated with stream flow changes, rather than using the sophisticated habitat modeling undertaken by PLP, which will provide the basis for a science-based impact assessment under NEPA.

A proper science-based surplus water release strategy, employing more rigorously devised hydrology estimates and sophisticated modelling of stream flow-habitat relationships, would demonstrate how to achieve net spawning and rearing habitat gains for the vast majority of anadromous and resident fish species. This singular example demonstrates the serious methodological and scientific flaws underlying the Assessment, and why EPA must await the submission of a proposed development plan for the Pebble Project and completion of a comprehensive EIS under NEPA before undertaking any regulatory action under Section 404(c).

The EPA Assessment itself is a biased document with a pre-determined outcome, as demonstrated by EPA's actions and procedures prior to initiating the Assessment, and during its development.

First, before the Assessment process even began, personnel in EPA's Region 10 were requesting funds to initiate a veto.[8] According to the request, "While resorting to exercising EPA's 404(c) authority is rare (only 12 actions since 1981), the Bristol Bay case represents a clear and important need to do so given the nature and extent of the adverse impacts coupled with the immense quality and vulnerability of the fisheries resource."[9] EPA personnel worked closely with mine opponents and lobbied other agencies to support a veto. One EPA ecologist wrote about the "catastrophic failure" certain to result from the mine,[10] and wrote in an email to a

[8] U.S. EPA, FY11 Proposed Investment: Bristol Bay 404(c).
[9] *Id.*
[10] Letter from Richard E. Schwartz, Attorney for Northern Dynasty Minerals Ltd. to Arthur A. Elkins, Jr. Inspector General, EPA, at 2-4 (Mar. 19, 2014).

mine opponent, "We have been discussing 404(c) quite a bit internally at all levels of EPA. This letter will certainly stoke the fire. I look forward to talking to you in the near future."[11] After finding traction in EPA and among mine opponents, that EPA ecologist took his advocacy to other federal agencies, enlisting the support of the U.S. Fish and Wildlife Service. The collaboration seemed to make a veto a foregone conclusion; one USFWS internal memorandum dated October 1, 2010 was titled, "EPA to Seek Service Support *When* They Use Section 404(c) of the Clean Water Act."[12] The Assessment was merely a tool to support EPA's predetermined goal: to preemptively kill the Pebble Project. As a result of EPA's clear bias, the Assessment's conclusions, as well as its ability to serve as a foundation for a major regulatory decision, are unreliable.

Second, the peer review process casts significant doubt on the ultimate quality, utility, and scientific integrity of the Assessment. For the 2012 and 2013 draft Assessments, EPA manipulated the process and short-circuited traditional review procedures to minimize criticism. Peer review of reports authored by mine opponents upon which EPA heavily relied for its draft Assessment found several significant flaws in the reports' methodologies and the data that EPA incorporated into the Assessment. The peer review comments make clear that the Assessment should not be relied upon to support a major regulatory decision such as a Section 404(c) veto. EPA scientists apparently agree, as they repeatedly stated that the Assessment is "not a decision document" in response to the peer review and public comments.[13]

In sum, not only is the Assessment based on speculative mine scenarios that do not reflect international best practices or even, in some instances, conventional mining practices, it is also based on data and analyses that are both less exhaustive and of lower overall quality than would be undertaken as part of an EIS process under NEPA. Indeed, EPA scientists' own characterizations undermine any attempt to use the Assessment as a basis of a Section 404(c) veto of the Pebble Project. To take any action under Section 404(c), EPA must have a record clearly establishing an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." The Assessment does quantify any impact on any regional fishery – commercial, subsistence or sport – and as such, cannot be that record.

A Section 404(c) Veto Would Violate the Alaska Statehood Act and ANILCA

EPA's attempt to usurp the Section 404 process before it has even begun demonstrates that this initiation of the Section 404(c) veto process is not about a particular permit, but instead is based on EPA's broader goal of precluding development of the state lands in the Bristol Bay watershed. One internal EPA document even characterized the option of waiting for the permitting process as a disadvantage because "only that project would be prohibited", which did not serve EPA's goal of "proactive watershed planning."[14] These statements indicate that EPA is effectively precluding any development of the state lands, which violates the statutory

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[11] *Id.* at 5.
[12] Letter from Richard E. Schwartz, Attorney for Northern Dynasty Minerals Ltd. to Arthur A. Elkins, Jr. Inspector General, EPA, at 8 (Mar. 19, 2014) (emphasis added).
[13] *See, e.g.*, Response to Peer Review Comments, at 35.
[14] EPA, Bristol Bay 404(c) Discussion Matrix, HQ Briefing, at 1 (Sept. 8, 2010).

compromise established in the Alaska Statehood Act and ANILCA. Congress adopted both statutes to balance Alaska's economic interests in its land with environmental conservation efforts. EPA's reach beyond its statutory authority under Section 404(c) of the CWA is a blatant attempt to bypass Congress's explicit intent to prevent the federal government from usurping Alaska's interests.

The Harms of Initiating a Preemptive 404(c) Process Greatly Outweigh EPA's Stated Benefits

EPA cannot find that the Pebble Project will have an "unacceptable adverse effect", and thereby, cannot issue a Section 404(c) veto, because a permit application has not yet been submitted. The February 28, 2014 EPA letter insists that "mining the Pebble deposit will involve excavation of the largest open pit ever constructed in North America, completely destroying an area as large as 18 square kilometers and as deep as 1.24 kilometers." Yet the sponsors of the Pebble Project have not proposed a specific mine project and the area of potential impact cannot be known until the location, scope and scale of the project is determined. It is axiomatic that EPA cannot determine whether the proposed Pebble Project will have an unacceptable adverse effect on aquatic resources without a permit application outlining the project's specific location, size and characteristics.

Preemptive Section 404(c) action is also premature and unnecessary since EPA retains its veto authority after a permit application is submitted and an EIS has been completed. EPA will be able to participate fully in the EIS and CWA review processes well before any mine development activities could proceed. Therefore, no harm to the environment will occur should EPA follow the proper permitting process for this project – waiting for an application, the Corps' review, and an EIS. Moving forward with a preemptive veto, on the other hand, will have far-reaching impacts on this project and the local economy. The Pebble Project would provide a much needed boost to struggling local communities, including employment and tax payments that would provide resources for additional schools, health facilities and other community infrastructure. For EPA to stop this project without a full permit and NEPA review process, including consideration of socioeconomic impacts, would be unsupportable and unforgiveable.

A preemptive veto will also substantially deter investments in other major projects requiring Section 404 permits, potentially resulting in substantial impacts to the U.S. economy. EPA's ability to preemptively veto projects before a permit application is even filed creates significant regulatory uncertainty for all major projects that require Section 404 permits, and will cause developers to distrust the entire Section 404 permitting process. The financial risk of backing a project that requires a Section 404 permit is significantly increased if a possibility exists that a project could be vetoed by EPA even before an applicant has an opportunity to propose a specific project or to demonstrate its ability to meet CWA criteria. The potential harm resulting from decreased domestic and foreign investment is significant: the Corps processes approximately 60,000 CWA 404 permits each year, and, according to some estimates, roughly $220 billion of investment per year depends on these permits.[15] EPA should respect the

[15] *See* David Sunding, *Economic Incentive Effects of EPA's After-the-Fact Veto of a Section 404 Discharge Permit to Arch Coal*, at 1 (May 2011).

permitting process that Congress established. To usurp the Corps' (and State's) role here will only serve to undermine the legitimacy and predictability of the Section 404 permitting process.